FILE COPY

APR 21 1970

JOHN F. DAVIS, CLERK

No. 1453

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

MOBIL OIL CORPORATION,
Petitioner,

vs.

MARY KATHERINE HUGHES, ET VIR,
Respondents.

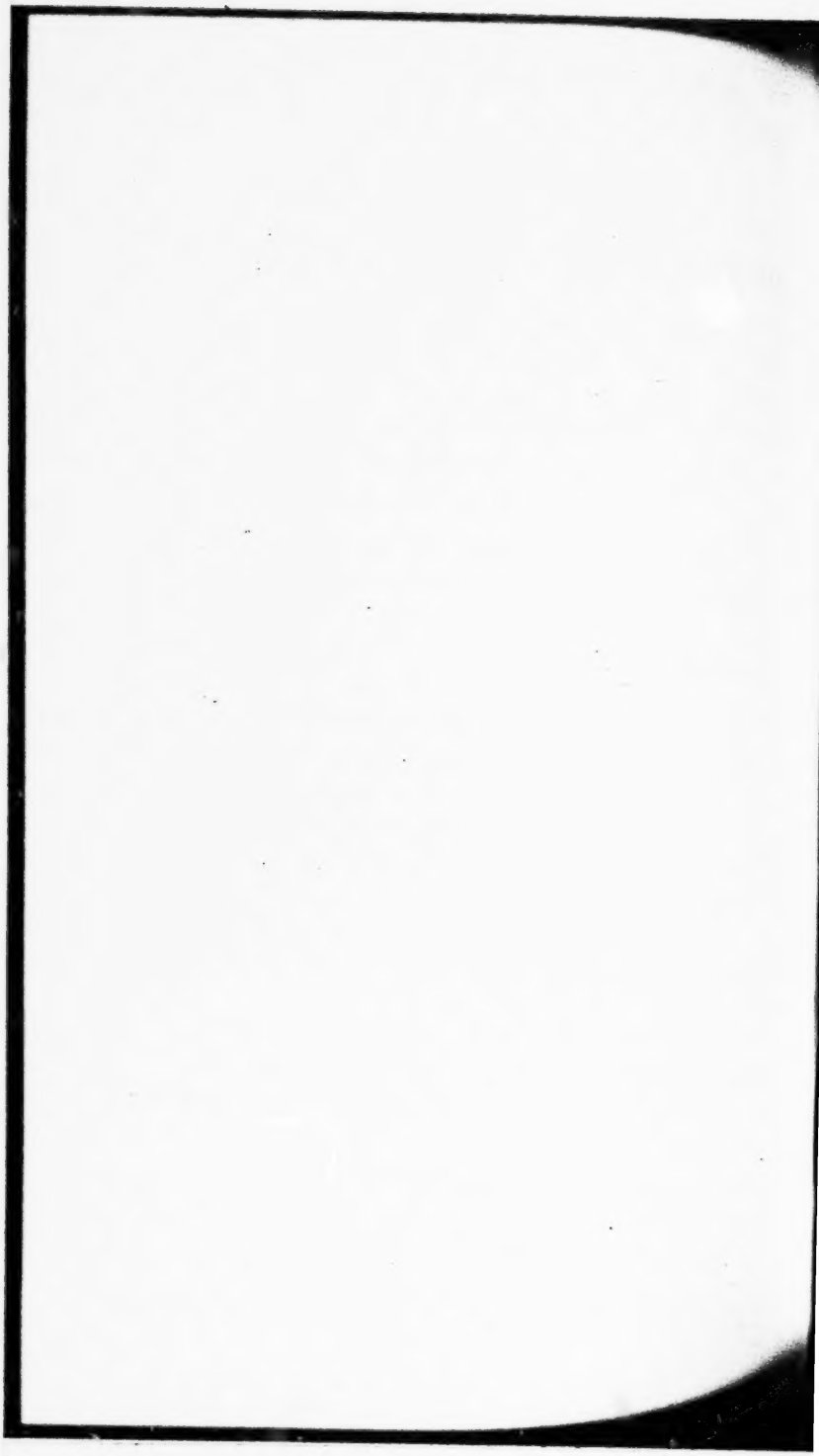
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JACK T. AKIN
P. O. Box 633
Midland, Texas 79701
MAX N. OSBORN
P. O. Box 913
Midland, Texas 79701
IRBY L. DYER
P. O. Box 913
Midland, Texas 79701
Attorneys for Petitioner

Of Counsel:

TURPIN, SMITH, DYER, HARDIE & HARMAN
P. O. Box 913
Midland, Texas 79701

E. L. MERSEREAU, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030



BLEED THROUGH POOR COPY

INDEX

Opinion of the Court Below 2

Grounds on Which Jurisdiction Is Invoked 2

Questions Presented 2

Statutes and Constitutional Amendment Involved 3

Statement 3-8

Reasons for Granting the Writ 8-13

1. The action of the trial court constituted an invasion of the province of the jury contrary to the Seventh Amendment of the United States Constitution 8-10

2. The decision of the Court of Appeals is not in accord with the applicable decisions of the Supreme Court of Texas 10-12

3. The questions here presented have great importance and far-reaching effect 12-13

4. The decision of the trial court and Court of Appeals was clearly erroneous 13

Conclusion 14

Certificate 15

Appendix A—Opinion by the United States Court of Appeals, Fifth Circuit A1-A6

Appendix B—Judgment of the United States Court of Appeals, Fifth Circuit A7

Appendix C—Order Denying Rehearing A8

Index to Authorities

CASES

Atlantic & Gulf Stevedores v. *Ellerman Lines*, 369 U.S. 355, 7 L. Ed. 2d 798, 82 S. Ct. 780 12

Biggers v. *Continental Bus System*, 303 S.W. 2d 359 (Tex. S. Ct., 1957) 11

Boeing Company v. *Shipman*, 411 F. 2d 365 (5th Cir., 1969) 9, 10

Box v. *Swindle*, 306 F. 2d 882 (5th Cir., 1962) 13

Burcham v. *J. P. Stevens & Co.*, 209 F. 2d 35 (4th Cir., 1953) 13

Byrd v. *Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 2 L. Ed. 2d 953, 78 S. Ct. 893 ..... 10, 12

Erie Railroad Company v. *Tompkins*, 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817 12

Gibson v. *Phillips Petroleum Company*, 352 U.S. 874, 1 L. Ed. 2d 77, 77 S. Ct. 16 ..... 10, 12

Greyhound Company v. *Dewey*, 240 F. 2d 899 (5th Cir., 1957) 13

Griffith v. *Hudspeth*, 378 S.W. 2d 163 (Tex Civ App., 1964, no writ history) 9

Mitchell v. *Ellis*, 374 S.W. 2d 333 (Tex. Civ. App., 1963, writ ref.) 11

Myers v. *Gulf Coast Minerals Management Corp.*, 361 S.W. 2d 193 (Tex. S. Ct., 1962) 11

Penney, J. C., Company v. *Oberpillar*, 141 Tex. 128, 170 S.W. 2d 607 (Tex. S. Ct., 1943) 11

Placencia v. *Western Union Telegraph Company*, 141 Tex. 247, 172 S.W. 2d 86 (Tex. S. Ct., 1943) 11

Simler v. *Conner*, 372 U.S. 221, 9 L. Ed. 2d 691, 83 S. Ct. 609 10

Skelly Oil Company v. *Archer*, 334 S.W. 2d 855 (Tex. Civ. App., 1960) 11

Southwest Dairy Products Company v. *DeFrates*, 132 Tex. 56, 125 S.W. 2d 282 (Tex. Comm. App., 1939) 11

Standard Oil Company v. *Anderson*, 212 U.S. 215, 53 L. Ed. 480, 29 S. Ct. 252 (1909) 12

Swafford v. *Atlantic Coast Line Railroad Co.*, 350 U.S. 807, 100 L. Ed. 725, 76 S. Ct. 80 10

BLEED THROUGH, POOR COPY

Thomas v. *Travelers Insurance Company*, 423 S.W. 2d 359 (Tex. Civ. App., 1967, writ ref.) 11

Wichita Royalty Co. v. *City Nat. Bank*, 306 U.S. 103, 83 L. Ed. 515, 59 S. Ct. 420 12

Wilkerson v. *McCarthy*, 336 U.S. 53, 93 L. Ed. 497, 69 S. Ct. 413 12

Williams v. *Carolina Life Insurance Co.*, 348 U.S. 802, 99 L. Ed. 633, 75 S. Ct. 30 10

Wood v. *Mullins*, 282 S.W. 2d 243 (Tex. Civ. App., 1955, writ ref., n.r.e.) 11

Zalta v. *Houston Transit Co.*, 384 S.W. 2d 914 (Tex. Civ. App., 1964, no writ history) 9

CONSTITUTIONAL PROVISIONS AND STATUTES

Rules of Decision Act, 28 U.S.C., §1652 3

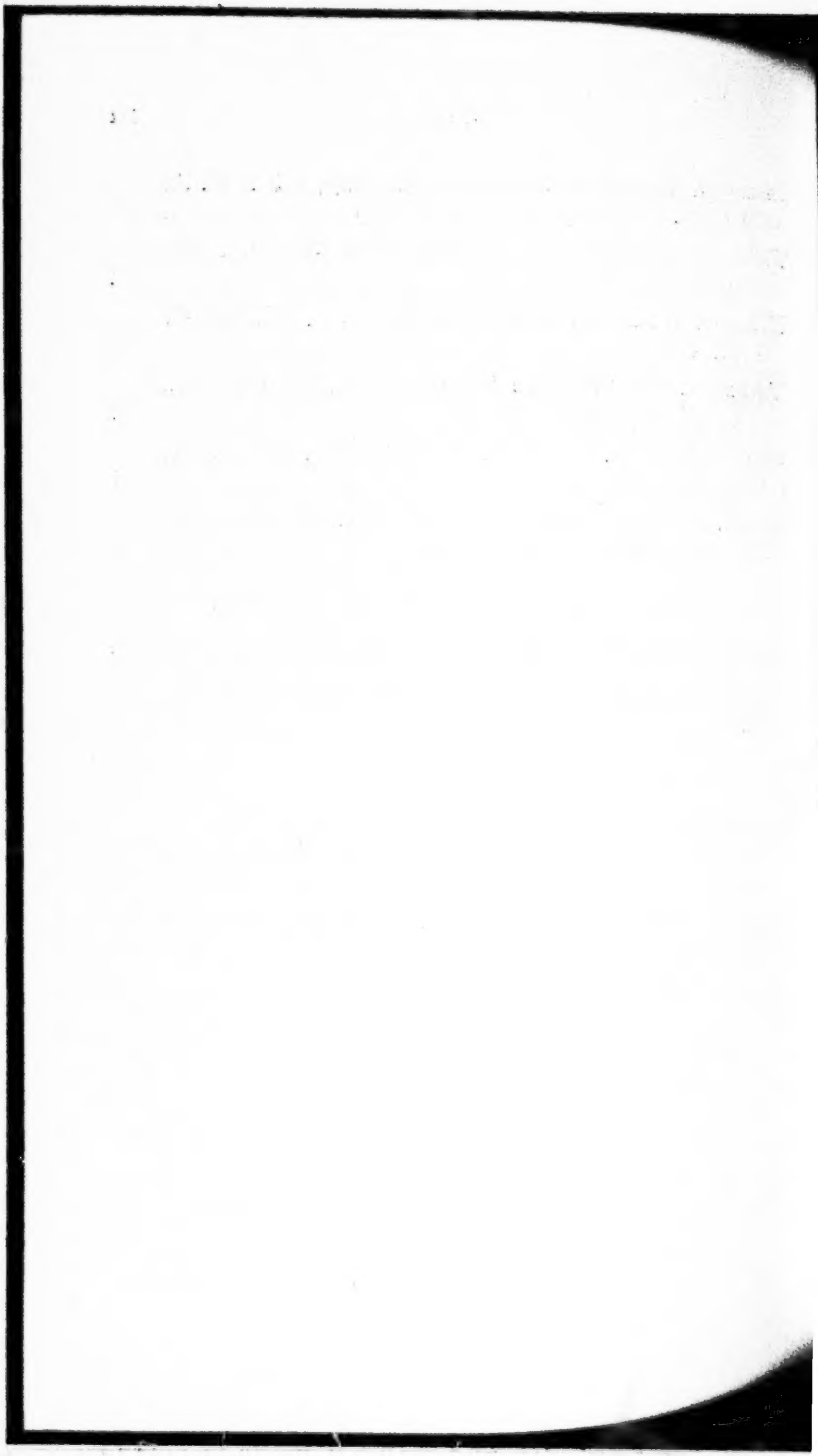
Seventh Amendment to the United States Constitution 3

TEXTS

Bagalay, *Directed Verdicts and the Right to Trial by Jury in Federal Courts*, 42 Texas Law Review 1053 (1964) 12

Green, *Protection of Jury Trial in Diversity Cases*, 35 Texas Law Review 768 (1957) 12

Wright, *Federal Courts*, 371-372 (1963) 12



No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

MOBIL OIL CORPORATION,
Petitioner,

vs.

MARY KATHERINE HUGHES, ET VIR,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Mobil Oil Corporation, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on February 3, 1970, and in which Petition for Rehearing was denied March 19, 1970.

I.

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (A. 226) printed in Appendix A hereto, infra, page A1, is not as yet reported.

II.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 3, 1970 (A. 227; Appendix B, infra, page A7). Rehearing was denied on March 19, 1970 (A. 228; Appendix C, infra, page A8). The jurisdiction of this Court is invoked under 28 U.S.C.A., Section 1254 (1).

III.

QUESTIONS PRESENTED

1. Whether the trial court erred in instructing the jury that the driver of Petitioner's vehicle was guilty of negligence as a matter of law where the evidence was conflicting and whether the trial court and Court of Appeals erred in holding that under the Seventh Amendment of the Constitution of the United States, Petitioner, in a diversity of citizenship case, was not entitled to have the jury consider and determine the fact issue concerning whether the driver of its automobile was negligent in keeping a proper lookout?

2. Whether a Court of Appeals may, in arriving at a decision on a case, under its appellate jurisdiction by virtue of diversity of citizenship of the parties, apply substantive law which is in direct conflict with the law of the State from which the case was appealed as set forth by the highest Court of the State?

BLEED THROUGH POOR COPY

IV.

STATUTES AND CONSTITUTIONAL AMENDMENT INVOLVED

1. The Constitutional Amendment involved in this case is the Seventh Amendment to the Constitution of the United States which provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

2. The statutory provision involved in this case is the Rules of Decision Act, 28 U.S.C., Section 1652, which provides as follows:

> "The laws of the several States except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the Courts of the United States in cases where they apply."

V.

STATEMENT

This diversity of citizenship case (A. 8) was filed in the United States District Court for the Western District of Texas, Pecos Division, as the result of an accident that occurred when the vehicle being driven by Mrs. Hughes was struck in the rear end while preparing to make a left turn at an intersection in Andrews, Texas. The car which hit the vehicle being driven by Mrs. Hughes was owned by the Petitioner (referred to herein as "Mobil") and being driven at the time of the accident by Mobil's Production Foreman, Gilbert Jurenka, who was on his way to the

Andrews, Texas, Country Club to take a chest of ice to a member of the Ladies' Association of the Andrews Country Club, who at the time were selling iced tea and lemonade during a golf tournament. Mobil denied that Mr. Jurenka was in the course and scope of his employment at the time of the accident and that he was guilty of negligence in causing the accident (A. 14).

The trial court instructed the jury that Mr. Jurenka was guilty of negligence as a matter of law in failing to keep a proper lookout (A. 179). The trial court refused Petitioner's motion for instructed verdict (A. 192-195), and refused Petitioner's motion for judgment non obstante veredicto or, in the alternative, for a new trial (A. 204-212), and entered judgment against the Petitioner on the jury verdict (A. 213, 214). A prior judgment in this case was reversed by the Court of Appeals in an opinion published at 388 F. 2d 586.

Trial by Jury Issue

Only two witnesses, the Respondent Mary Katherine Hughes, and Gilbert Jurenka, the drivers of the two vehicles, testified to the actual circumstances and facts involved in the happening of the accident between the two vehicles.

Mrs. Hughes testified that the accident occurred about 2:30 p.m. on Sunday afternoon, August 25, 1963 (A. 78). She testified that she and five other girls were traveling east on Broadway Street in her father's 1963 Chevrolet automobile (A. 79-80). She said that as she approached the intersection of Broadway and Northeast Second Street she knew she was going to turn left and about half a block before where she was going to turn she put on her turn signal and continued for a little bit on down the road and then put her foot on the brake, and by the time she had

reached the intersection she had come to a complete stop (A. 80-81). According to her testimony it was necessary for her to stop to permit approaching traffic the opportunity to clear the intersection before she turned (A. 81). She estimated that she was stopped from 30 to 45 seconds before the impact (A. 81). Her father testified that the cost of repairs to his vehicle was $70.00 to $80.00 (A. 119).

Mr. Jurenka testified that he was driving east on Broadway at approximately 25 to 30 miles per hour, looking straight ahead, and saw the signal for the left turn (A. 143-144, 161). It was his opinion that she had plenty of time to turn before the approaching traffic reached the intersection (A. 144, 146, 156, 166). At the time he saw her turn lights come on he looked in the rear-view mirror and looked over to his right to see if he could move into the righthand lane (A. 144). When he looked back in front of him Mrs. Hughes had stopped and he applied his brakes and attempted to turn to the right but struck the rear end of her vehicle (A. 145). Mr. Jurenka testified that from the time he looked in his rear-view mirror and to the right and back in front again, one to two seconds elapsed and that during this period of time Mrs. Hughes had stopped her car at the intersection (A. 156). He estimated that when her signal light came on he was 60 to 80 feet behind the Chevrolet and that when he looked in the rear-view mirror and she applied her brakes and he looked back, he was probably 30 feet behind her car (A. 156). He skidded about three to six feet and did $92.00 worth of damage to the Mobil vehicle (A. 156, 128, 143). It was Mr. Jurenka's testimony that from the time the signal light came on until the accident occurred approximately four seconds elapsed and that there was no way in the world that Mrs. Hughes could have been stopped at the intersection 20 to 30 seconds before the impact (A. 162). Mr. Jurenka testified, as did

Mrs. Hughes, that the brake signal, indicating an intention to stop was not activated at the time the turn signal was activated (A. 162, 81, 103).

According to Mrs. Hughes' testimony, at no time did she look in the rear-view mirror before coming to a complete stop, but had she looked and seen a car behind her, there would not have been anything to prevent her from giving a signal of intention to stop at the same time she gave a signal of intention to turn (A. 104).

In his charge to the jury the trial judge instructed the jury that Mr. Jurenka was guilty of negligence as a matter of law in failing to keep a proper lookout (A. 179, ¶(b)). The Petitioner made timely objections to this instruction by the court (A. 187, 188).

Scope of Employment Issue

Only two witnesses, Mr. Jurenka and Mrs. Webb, testified concerning Mr. Jurenka's duties on the date of the accident and the purpose of his trip when the accident occurred. Mr. Jurenka was a Production Foreman for Mobil when the accident occurred on August 25, 1963 (A. 125, 126). He and his assistant were normally off duty two days out of every two weeks and normally they alternated working every other weekend (A. 128, 129). Mr. Jurenka's normal working day was from 7:00 a.m. until 5:00 p.m. and on weekends when he worked he normally took off Sunday afternoon (A. 149-150, 130). When he was in town but not on duty he was on call twenty-four hours a day (A. 130).

On August 25, 1963, a Sunday, he went to his office about 7:00 a.m. and, after completing some paper work, made several trips to an oil well located southwest of the City of Andrews (A. 132, 133). After running some checks at the well it was determined that it would be necessary to pull the well (A. 133). By noon Mr. Jurenka had fin-

BLEED THROUGH POOR COPY

ished his office and field work and went to the Country Club, where his wife was working as a member of the Ladies' Association, to have lunch (A. 150-151). He testified, "Usually, we didn't work in the afternoon unless there was something specific to do" (A. 150). After lunch Mr. Jurenka went home, since he didn't have anything to do at that particular time, and was only required to be "on call" if needed (A. 151). While at home he pulled some weeds in the back yard and turned off the water sprinklers (A. 138).

He then went back to the Country Club and advised his wife that he was going to DA & S Well Service Office (A. 138). At that time his wife asked him to pick up some ice from an ice maker located at DA & S (A. 138, 152). He then proceeded from the Country Club on the east side of town to DA & S Well Service on the west side of town (A. 152, 153). This was a distance of about twenty-five blocks (A. 153). There was no one present in the office of DA & S and Mr. Jurenka decided to wait until the next morning to contact them, and then proceeded to the back of the office where he loaded the ice chest and put it in the back seat of his car (A. 142, 158). Concerning subsequent events he testified:

"Q. All right. When you left there, you were going, then, back to take the ice back by the Country Club?

"A. Yes, sir." (A. 142).

"* * *

"Q. From that time—from the time you got there and found out there wasn't anybody there that you needed to see about the pulling unit, from that time until 7:00 o'clock the next morning, did you do anything for Mobil?

"A. No, sir.

"Q. Did you get any calls from anybody?

"A. No, sir.

"Q. All right. What did you do, then, after you put this ice chest in the car?

"A. I started back east on Broadway.

"Q. All right. And intending to go where?

"A. Back to the Country Club." (A. 153-4).

"* * *

"Q. All right, sir. Now with regard to the trip to the Country Club was there anything about that trip or anything that transpired or anything you did with the rest of the day that was in connection with your duties for Mobil Oil?

"A. No, sir.

"Q. Did you make that trip there for the sole purpose and only purpose of taking the ice?

"A. That is right." (A. 160).

Mr. Jurenka also testified that he had been instructed not to use the company car for personal business prior to the accident (A. 164).

Mrs. Webb testified that on August 25, 1963, she was working as a member of the Ladies' Association at the Andrews Country Club selling sandwiches, tea and lemonade (A. 166). She said that on that afternoon Mr. Jurenka delivered to her at the fourteenth hole a chest of ice (A. 167).

VI.

REASONS FOR GRANTING THE WRIT

1. The action of the trial court constituted an invasion of the province of the jury contrary to the Seventh Amendment of the United States Constitution.

As set forth in the Statement above, the testimony of the two drivers was in great conflict as to how the accident happened. The Respondent Mrs. Hughes said she had to stop at the intersection because of approaching

BLEED THROUGH POOR COPY

traffic (A. 81). Mr. Jurenka, the driver of the Mobil vehicle, testified that in his opinion the Respondent had plenty of time to turn despite the approach of other vehicles (A. 144, 146, 155). The Respondent testified that she had been stopped from thirty to forty-five seconds when the accident occurred (A. 81). Mr. Jurenka testified that she had been stopped one or two seconds (A. 156) and not twenty or thirty seconds before the impact (A. 162). Despite this conflict in the evidence and the fact that the credibility of each witness was in issue and the fact that Mr. Jurenka had a duty to look to the rear to ascertain whether his turn to the right could be made with safety[1], the trial court refused to permit the jury to pass upon whether or not the conduct of Mr. Jurenka on the issue of lookout constituted negligence or not, but instead instructed that he was negligent as a matter of law (A. 179).

In 1969, the United States Court of Appeals, Fifth Circuit, sitting en banc, stated that in diversity cases Federal Courts apply a Federal rather than a State test to determine the sufficiency of the evidence to create a jury question and further, that it is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses. *Boeing Company* v. *Shipman*, 411 F. 2d 365. But less than one year later that same Court, in deciding this case, makes no mention of the Federal test and affirms the action of the trial court, citing *only* cases from Texas courts, none of which were decided under nor are authoritative in the Federal Courts where the dictates of the Seventh Amendment apply!

1. *Griffith* v. *Hudspeth*, 378 S.W. 2d 163 (Tex. Civ. App., 1964, no writ history); *Zalta* v. *Houston Transit Co.*, 384 S.W. 2d 914 (Tex. Civ. App., 1964, no writ history).

These facts certainly present a situation in which this Honorable Court has on numerous occasions granted Writs of Certiorari, thereby preventing the trial court or appellate court from invading the province of the jury and substituting its own conclusions for that of the jury upon disputed facts. *Byrd* v. *Blue Ridge Rural Electric Cooperative,* 356 U.S. 525, 2 L. Ed. 2d 953, 78 S. Ct. 893; *Simler* v. *Conner,* 372 U.S. 221, 9 L. Ed. 2d 691, 83 S. Ct. 609. Where the dictates of the Seventh Amendment have not been followed, this Honorable Court has not hesitated to reverse the lower court in negligence as well as other type cases. *Williams* v. *Carolina Life Insurance Co.,* 348 U.S. 802, 99 L. Ed. 633, 75 S. Ct. 30; *Swafford* v. *Atlantic Coast Line Railroad Co.,* 350 U.S. 807, 100 L. Ed. 725, 76 S. Ct. 80; *Gibson* v. *Phillips Petroleum Co.,* 352 U.S. 874, 1 L. Ed. 2d 77, 77 S. Ct. 16. See, also, *Boeing Company* v. *Shipman,* 411 F. 2d 365 (5th Cir., 1969), Footnote 19 at page 389.

2. The decision of the Court of Appeals is not in accord with the applicable decisions of the Supreme Court of Texas.

This being a diversity of citizenship case from Texas, the Court of Appeals, under the *Erie* doctrine, was obligated to apply Texas law in determining the question of whether or not Mr. Jurenka was in the scope of his employment at the time of the accident. Under the Texas law, for an act to be in the course and scope of a servant's employment, it is necessary that:

(1). It be done within the scope of the general authority of the servant,

(2). In the furtherance of the master's business, and

BLEED THROUGH, POOR COPY

(3). For the accomplishment of the object for which the servant is employed. *Mitchell* v. *Ellis*, 374 S.W. 2d 333 (Tex. Civ. App., 1963, writ ref.[2]).

In the opinion on the first appeal Judge Griffin Bell, writing for the Court and noting the status of Mr. Jurenka, said:

"He was on call at the time of the accident * * *." 388 F. 2d 586, 587.

Certainly any first-year law student knows that the employee could not at the same time be *both* "on call" and "on duty". In *Wood* v. *Mullins*, 282 S.W. 2d 243 (Tex. Civ. App., 1955, writ ref., n.r.e.), and *Thomas* v. *Travelers Insurance Company*, 423 S.W. 2d 359 (Tex. Civ. App., 1967, writ ref.), the Texas courts have had opportunity to pass upon the status of an employee who was at the time of an accident "on call" and in each instance held that during such status the employee was not in the scope of his employment. The *Wood* case is directly in point and involves an employee occupying the same status as that occupied by Mr. Jurenka in this case. The Fifth Circuit chose to ignore that decision and others by the Texas Supreme Court to the effect that one performing a personal mission unrelated to his master's business is not in the course and scope of his employment. *Southwest Dairy Products Company* v. *DeFrates*, 132 Tex. 56, 125 S.W. 2d 282 (Tex. Comm. App., 1939); *Placencia* v. *Western Union Telegraph Company*, 141 Tex. 247, 172 S.W. 2d 86 (Tex. S. Ct., 1943); *J. C. Penney Company* v. *Oberpillar*, 141 Tex. 128, 170 S.W. 2d 607 (Tex. S. Ct., 1943). "The master's respon-

2. The Texas Supreme Court having refused the application for writ of error, the opinion has the same efect as a decision by the highest court of the State. See *Biggers* v. *Continental Bus System*, 303 S.W. 2d 359, 364 (Tex. S. Ct., 1957); *Skelly Oil Company* v. *Archer*, 334 S.W. 2d 855, 860 (Tex. Civ. App., 1960); *Myers* v. *Gulf Coast Minerals Management Corp.*, 361 S.W. 2d 193, 196 (Tex. S. Ct., 1962).

sibility cannot be extended beyond the limits of the master's work. If the servant is doing his own work or that of some other, the master is not answerable for his negligence in the performance of it." *Standard Oil Company* v. *Anderson,* 212 U.S. 215, 221, 53 L. Ed. 480, 483, 29 S. Ct. 252 (1909).

Since the Court of Appeals did not follow the law of Texas, a typical situation is presented in which this Honorable Court has on a number of occasions granted Writs of Certiorari. *Erie Railroad Company* v. *Tompkins,* 304 U.S. 64, 82 L. Ed. 1188, 58 S. Ct. 817; *Wichita Royalty Co.* v. *City Nat. Bank,* 306 U.S. 103, 83 L. Ed. 515, 59 S. Ct. 420; *Gibson* v. *Phillips Petroleum Company,* 352 U.S. 874, 1 L. Ed. 2d 77, 77 S. Ct. 16.

3. The questions here presented have great importance and far-reaching effect.

Not only in the State of Texas, but in all of the States the Constitutional guaranty of right to trial by jury is equally important to all parties involved in litigation in a Federal Court. This Honorable Court on numerous occasions has given full application to the provisions of the Amendment. *Wilkerson* v. *McCarthy,* 336 U.S. 53, 93 L. Ed. 497, 69 S. Ct. 413; *Byrd* v. *Blue Ridge Rural Electric Cooperative,* 356 U.S. 525, 2 L. Ed. 2d 953, 78 S. Ct. 893; *Atlantic & Gulf Stevedores* v. *Ellerman Lines,* 369 U.S. 355, 7 L. Ed. 2d 798, 82 S. Ct. 780. Many others have also written on this Constitutional guaranty. Green, *Protection of Jury Trial in Diversity Cases,* 35 Texas Law Review 768 (1957); Wright, *Federal Courts,* 371-372 (1963); Bagalay, *Directed Verdicts and the Right to Trial by Jury in Federal Courts,* 42 Texas Law Review 1053 (1964).

Certainly if the facts in *Gibson* v. *Phillips Petroleum Company,* supra, were such as to insure the right to trial

BLEED THROUGH POOR COPY

by jury in that negligence case, there should be no reason to deny Mobil such a right in this case! No other case has been found where the *trial judge acting on his own,* and without motion from a party, has taken a fact issue from the jury under disputed facts and instructed that the conduct of one of the drivers constituted negligence as a matter of law. With great numbers of accident cases pending in all Federal Courts, this Court should not condone such procedures which violate Constitutional guaranties.

At least of equal importance to businesses throughout the nation is the question of their liability for acts of employees driving company cars at times when they are not performing specific tasks for the employer, but instead on a mission of their own. There is no authority to support the conclusion of Judge Godbold that an employer is still responsible for the conduct of the employee even "while between specific tasks" for his employer. This Honorable Court should not leave standing such a decision which extends the respondeat superior doctrine to make a master an insurer of the acts of its servants.

4. The decision of the trial court and Court of Appeals was clearly erroneous.

The results reached in this case are contrary to those reached in cases where a Federal test was applied. See *Box* v. *Swindle,* 306 F. 2d 882 (5th Cir., 1962); *Greyhound Company* v. *Dewey,* 240 F. 2d 899 (5th Cir., 1957); *Burcham* v. *J. P. Stevens & Co.,* 209 F. 2d 35 (4th Cir., 1953).

CONCLUSION

The undisputed evidence having established that at the time of the accident Mr. Jurenka was on a frolic of his own, wholly unrelated to his employment with Mobil, the trial court and Court of Appeals erred in holding Mobil liable under the doctrine of respondeat superior. Even if Mobil be responsible for the conduct of Mr. Jurenka while going to the Country Club on Sunday afternoon, this Petitioner was entitled to a jury determination on the issue of negligence of the driver of its vehicle under the guaranties of the Seventh Amendment and the case should be remanded for a jury determination of that issue.

WHEREFORE, Petitioner prays that this Honorable Court grant Petitioner's Petition for Certiorari.

Respectfully submitted,

JACK T. AKIN
P. O. Box 633
Midland, Texas 79701
MAX N. OSBORN
P. O. Box 913
Midland, Texas 79701
IRBY L. DYER
P. O. Box 913
Midland, Texas 79701

By: Irby L. Dyer
IRBY L. DYER
Attorneys for Petitioner

Of Counsel:
TURPIN, SMITH, DYER, HARDIE & HARMAN
P. O. Box 913
Midland, Texas 79701

CERTIFICATE

I, Irby L. Dyer, one of the attorneys for Mobil Oil Corporation, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 20th day of April, 1970, I served a copy of the foregoing Petition for Writ of Certiorari and attached Appendices on Mr. Warren Burnett, Burnett & Childs, attorneys for Respondents, by depositing the same in the United States mail with first class postage prepaid, addressed to Mr. Burnett at his post office address, P. O. Box 3707, Odessa, Texas, 79760.

Irby L. Dyer

IRBY L. DYER

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27313

MARY KATHERINE HUGHES, ET VIR,
Plaintiffs-Appellees,

versus

MOBIL OIL CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

---

(February 3, 1970)

Before THORNBERRY, GODBOLD and MORGAN, Circuit Judges.

GODBOLD, Circuit Judge: This is the second appearance of this case in this court. In the first appearance[1] we concluded that the issue of the scope of employment of appellant's employee Jurenka was a matter for the jury. We are presented with neither change in circumstances nor change in the governing law which might make it appropriate for us to conclude that the law of the case should not

1. Socony Mobil Oil Company v. Taylor, 388 F.2d 586 (5th Cir. 1967.)

apply and that we now should reach the opposite conclusion, *e.g., Lincoln National Life Insurance Company* v. *Roosth*, 306 F.2d 110 (5th Cir. 1962).

The intervening case of *Thomas* v. *Travelers Insurance Company*, 423 S.W. 2d 359 (Tex. Civ. App., 1967, writ ref.) does not represent a change in the law. Appellant's difficulty is not one of changing law but of unchanging facts, i.e., testimony of its own employee that he was on duty on the Sunday in question. The duty encompassed performing specific tasks as they arose. That he caused injury while between specific tasks does not take him off duty.

Thomas concerned a tool pusher who was at home subject to call but off duty and free to carry on his own business. Jurenka was a production foreman, appellant's senior man in his line in the geographical area, in charge of 300 to 400 oil wells, and either be or his assistant, or both, were required to be on duty on Sunday. Both were described by Jurenka as being on duty on this Sunday.

Our review of a claim that the verdict is excessive is limited to instances of grave abuse of discretion where the defendant has, as it has here, urged that issue on motion for new trial and its motion has been denied. *Rosiello* v. *Sellman*, 354 F.2d 219 (5th Cir. 1955). No abuse of discretion by the trial judge appears in this case. Appellant's related contention that appellee's injuries and complaints were as a matter of law not causally related to the accident approaches being frivolous. Appellee testified to neck pain commencing on the day of the accident. She was examined by a doctor the next day and admitted to the hospital where for three weeks she was under treatment which included traction, injections in the neck and back, whirlpool baths and physiotherapy. The extent, if any, to which a subsequent fall contributed to her difficulties was for the jury.

BLEED THROUGH POOR COPY

The trial court found Jurenka guilty of negligence as a matter of law in failing to keep a proper lookout and submitted proximate cause to the jury. Lookout usually is a jury question, *Griffith* v. *Hudspeth*, 378 S.W. 2d 153 (Tex. Civ. App. 1964), *see* 2 Blashfield, *Automobile Law and Practice*, § 104.3 (3rd ed. 1965), but the evidence may be such that there is negligence as a matter of law. *Erck* v. *Zelios*, 401 S.W. 2d 867 (Tex. Civ. App. 1966); *Hoey* v. *Solt*, 236 S.W. 2d 244 (Tex. Civ. App. 1951).

The evidence in this case was that Jurenka was traveling behind appellee's car in the same (left) lane. He observed appellee's car signalling for a left turn to take place at an intersection, knew there was traffic approaching from the opposite direction, and thought there was time for appellee's car to make the left turn before the approaching traffic reached the intersection. Assuming that appellee would turn ahead of the approaching traffic, and in a situation where neither the action of appellee's car, nor of any other car, required him to do so, Jurenka, the trailing driver, elected to "wheel out to the right" and, taking his eyes from appellee's car, looked in his rear view mirror to see if the way was clear from him to turn into the right lane. When he brought his vision back to what was in front of him appellee's car had stopped to await passage of the on-coming traffic before making its turn. Jurenka was too close to turn out or to avoid appellee's stopped car and struck it from the rear. He acknowledged that if he had been watching appellee's car he would have stopped, let it negotiate its turn, and thus would not have collided with it. Jurenka's failure to keep a lookout was negligence as a matter of law. *Hoey* v. *Solt*, *supra*. Authorities urged by appellant are not to the contrary. In *LeMaster* v. *Fort Worth Transit Company*, 138 Tex. 512, 160 S.W. 2d 224 (1942), there was evidence that although

LeMaster ran into a bus when it suddenly stopped in front of him, the bus gave no signal prior to stopping, and LeMaster neither expected, nor had any reason to anticipate a stop at that place. In *Lovell* v. *Stanford*, ____ Tex. ____, 386 S.W. 2d 755 (1965), the driver of the lead car testified that she realized she must stop for traffic ahead of her on the freeway, and slowed for that purpose, signalling by both hand and brake lights. Drivers of Cars No. 2 and 3 testified that they were watching Car No. 1 and saw neither hand signal nor brake light. The driver of No. 2 testified that he observed No. 1 slowing down, glanced in his rear vision mirror for a fraction of a second to see if he could turn into the lane to his left and avoid Car No. 1, discovered that traffic in that lane foreclosed this course of action, then looked back at the car ahead of him which stopped so rapidly he was unable to stop without hitting it. In the case before us the testimony of what signal was given is without dispute. Also Jurenka was, on his own testimony, not the victim of an emergency presented by an unanticipated rapid stop —he acknowledged he would not have struck appellee had he been looking.[2]

The evidence was sufficient to raise an issue of excessive speed. Jurenka testified that he was approaching the scene at 25 to 30 miles per hour, that at 30 miles per hour he was traveling approximately 44 feet per second, that when, after looking away, he returned his vision to the scene in front of him he discovered he was within 30 feet of appellee's stopped car. He applied his brakes (and laid down short skid marks) and began to turn to

2. Burt v. Anderson, 408 S.W. 2d 572 (Tex. Civ. App. 1966) is not applicable. It concerned a freeway accident, in which rush hour high speed traffic stopped suddenly when a vehicle stalled, and a driver back in the line of traffic, faced with the chain reaction situation in front of him, sought to go into the right lane.

the right in order to avoid appellee's car. But he was unable to prevent the impact. We cannot say that under these circumstances his speed was at that time, as a matter of law, not excessive.

The court did not err in refusing to let Jurenka testify that if appellee had given a signal to stop at the time the signal to turn was given he (Jurenka) could have stopped prior to the accident. Accepting that practical experience may prima facie qualify one not an expert to express an opinion as to the distance within which an automobile could have stopped, if he knows the relevant conditions, 11 Blashfield, *op. cit. supra*, § 430.1, *El Paso Electric Co.* v. *Whitenack*, 297 S.W. 258 (Tex. Civ. App., 1927), *aff'd* 1 S.W. 2d 594 (1928), in this instance Jurenka was not asked to express an opinion at all. The defense sought to elicit from him an unqualified statement of what he, as a participant, could or could not have accomplished.

AFFIRMED.

APPENDIX B

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1969

No. 27313

D. C. Docket No. Civ. 68-65-MO
MARY KATHERINE HUGHES, ET VIR,
Plaintiffs-Appellees,

versus

MOBIL OIL CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas.

Before THORNBERRY, GODBOLD and MORGAN, Circuit Judges.

Judgment

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

It is further ordered that defendant-appellant pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

February 3, 1970

Issued as Mandate: March 30, 1970.

BLEED THROUGH POOR COPY

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27313

MARY KATHERINE HUGHES, ET VIR,
Plaintiffs-Appellees,

versus

MOBIL OIL CORPORATION,
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

---

On Petition for Rehearing and Petition for Rehearing En Banc

(March 19, 1970)

Before THORNBERRY, GODBOLD and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.